ABSENT EVIDENCE

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A stock federal jury instruction[1] provides that "If it is peculiarly within the power of either the prosecution or defense to produce a witness who could give material testimony on an issue in the case, failure to call that witness may give rise to an inference that his testimony would be unfavorable to that party." The instruction goes on to say that the inference is unavailable if the witness is equally available to each party or if the testimony would be merely cumulative.

That simple, and initially appealing, notion raises a host of questions. When is a person—in this age of wide-open discovery and the pervasive availability of the subpoena power—"peculiarly within the power" of either party? When is testimony not material, and how can that possibly be known without hearing the witness? Similarly, when the witness is not produced, how can one tell that the testimony is "merely cumulative"? Are these questions to be resolved by evidence or is the representation of counsel sufficient?[2] Assuming they are answered so as to entitle one party

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1. 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.19 (3d ed. 1977). For the counterpart instruction for civil cases, see 2 E. DEVITT & C. BLACKMAR at § 72.16. *See* Graves v. United States, 150 U.S. 118 (1893).

2. That question is never directly addressed. In United States v. Vincent, 648 F.2d 1046, 1051 (5th Cir. 1981), the trial court appeared to rely on the prosecutor's representation of unavailability because of an intention to rely on the self-incrimination privilege to halt defense counsel's missing witness argument. This was upheld on appeal. Conversely, in United States v. Latimer, 511 F.2d 498, 502 (10th Cir. 1975), defense counsel argued that the jury should disregard the eyewitness identification of defendant as a bank robber because the government had not offered surveillance photographs and "that the reason they didn't produce the film is because it doesn't identify the defendant." *Id.* The prosecutor in rebuttal said that the film was not produced because the camera malfunctioned. This was held prejudicially erroneous on appeal because no such evidence was in the record. The majority opinion ignored the fact that defense counsel was inviting an inference he knew to be false, intimated that a missing witness instruction was appropriate, and held that the reason for nonproduction only "may be explained by the testimony of other witnesses properly sworn and subject to cross-examination or by the introduction of other evidence at trial." *Id.* at 503 n.7. Only two courses of action seem open if *Latimer* is correctly decided. First, counsel could ask leave to reopen after the argument is made. *See* United States v. Vincent, 648 F.2d 1046, 1051 (5th Cir. 1981) ("We also refuse to reverse Vincent's conviction by reason of the trial judge's curtailment of defense counsel's jury argument. Defense counsel argued that an inference of reasonable doubt could be drawn from the government's failure to call Bill White as a witness. After objection by the government, the court admonished defense counsel that if this

to the instruction, is the giving of it antithetical to professed concerns with minimizing the cost and maximizing the expedition of litigation?[3] Does it impermissibly interfere with counsel's judgment as to how the case should be presented? What makes the invited inference logically persuasive? How can a jury decide whether to draw the inference and how adversely to weigh the failure? Does the action of the court tend to inappropriately magnify the weight the jury will give the failure?[4] If the instruction is not given, are counsel still free to invite the jury to give weight to any such failure to call a witness? If any inference is so unlikely as not to justify an instruction by the court, why should counsel be allowed to mislead the trier into thinking the inference sound?[5]

These questions are sufficiently difficult to deserve a systematic exposition of possible answers. They can be asked about a number of other common trial instructions and arguments, all relating to the absence of evidence. In exploring these issues, one comes quickly to the recognition that much of what goes on in courtrooms is more a matter of tradition and habit than of thought about what ought to be allowed to persuade. The conclusion of this essay is that it is inappropriate to invite, either by way of

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argument continued, he would allow the government to explain that White was not called because he was being tried for offenses growing out of the same affair and had previously invoked his Fifth Amendment privilege."). Second, every door can be closed by offering evidence during trial as to why any possible witness or piece of physical evidence was not offered.

This problem could be avoided by requiring, as some circuits do, that the intention to argue an adverse inference be announced to the court so that a determination of its appropriateness can be made and, presumably, so that explanatory evidence could be offered. *See* United States v. Beeler, 587 F.2d 340 (6th Cir. 1978); United States v. Blakemore, 489 F.2d 193 (6th Cir. 1973) ("When counsel for either side intends to argue to the jury for an adverse inference to be derived from the absence of witnesses, an advance ruling from the trial court should be sought and obtained . . . ."); United States v. Young, 463 F.2d 934 (D.C. Cir. 1972); Gass v. United States, 416 F.2d 767 (D.C. Cir. 1969). How such advance consideration works is illustrated by United States v. Malizia, 503 F.2d 578 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975). In *Malizia*, the informer purchaser of narcotics could not be found at trial, having stated that he would not testify for fear of being killed. The prosecutor, anticipating an absent witness argument, offered to prove this. The judge gave defense counsel the choice between making the argument and allowing the evidence in, or excluding the evidence and foregoing the argument. The appellate court upheld this option, quoting an earlier case saying that "it would present an anomaly in the law if, while one party may comment upon the absence of an opposing party's witness, ... the opposing party were not permitted to introduce evidence to excuse the absence of such witness." *Id.* at 581.

3. The risk of the inference invites the offer of all available evidence, thus extending both pretrial discovery and the trial itself. *See generally Proceedings, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79 (1976).

4. *E.g.*, Griffin v. California, 380 U.S. 609, 614 (1965) ("What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."); Burgess v. United States, 440 F.2d 226, 235 (D.C. Cir. 1970) ("argument of counsel is on quite a different legal level from an instruction of the court granting to the jury the right to draw the inference of unfavorable testimony. Such an instruction has the weight of law . . . .").

5. *Compare* United States v. Blakemore, 489 F.2d 193 (6th Cir. 1973), *and* United States v. Young, 463 F.2d 934, 939 (D.C. Cir. 1972) ("Both comment by counsel and instruction by the judge as to absent witnesses is prohibited if either of the conditions is lacking, that the witness was peculiarly within the power of the party to produce and that his testimony would elucidate the transaction."), *with* United States v. Mahone, 537 F.2d 922, 927 (7th Cir.), ("Given the uncertainty of whether Officer Payne's testimony would have been cumulative and irrelevant, we cannot say the trial judge erred by not giving the absent witness instruction . . . . However, we think the trial judge erred by refusing to let the defense counsel comment in his final argument on the government's failure to call the absent witness."), *cert denied*, 429 U.S. 1025 (1976). Arguing that the witnesses presented are insufficient, should, of course, be distinguished.

argument or instruction, an adverse evidentiary inference unless a judgment is made that it is desirable that such evidence should always be offered. An adverse evidentiary inference makes sense only as a means of insuring that evidence is available to resolve justly a dispute. To illustrate why this is so, I will discuss three common instances of absent evidence: the missing witness, the use of weaker evidence when stronger is available, and the failure to create or preserve evidence.

The Missing Witness

Assuming all the conditions of the missing witness instruction have been met, the first question to be asked is the theory by which it can be said that a party's failure to call a witness indicates that his testimony, the content of which is unknown, will be adverse to the party. Wigmore said "the basis of the inference . . . is our experience of the operation of human nature."[6] More expansively, he argued:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted.
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> The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to the party's cause*.[7]

In modern parlance, the failure is a representative admission by conduct. It is the failure to act by a party through his representative, his lawyer, which indicates a state of mind (that the evidence is unfavorable), from which it is proper to infer the truth of that state of mind (that the evidence in fact is unfavorable). It is similar to flight or the fabrication or suppression of evidence.[8] Under the federal rules of evidence, there is no need to go through the "admissions by conduct" exception to the hearsay rule, for conduct not intended as an assertion is not hearsay.[9] The evidentiary inference remains the same, however. The conduct of the lawyer in failing to call a witness is a circumstance from which the motive for that failure, and the truth of the facts underlying that motive, can be inferred.

The trouble with inferring belief from conduct is that often the belief that dictates conduct is unknown. That is, of course, also true of failing to

6. 2 J. WIGMORE, EVIDENCE 96 (Chadbourn rev. 1979).
7. *Id.* at 192.
8. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §§ 271, 273 (Cleary ed. 1972); United States v. Morando Alvarez, 520 F.2d 882 (9th Cir. 1975) (flight); United States v. Castillo, 615 F.2d 878 (9th Cir. 1977) (suppression).
9. FED. R. EVID. 801.

call a witness. Among the possible inferences are that the testimony is unknown, that it is adverse, that although it is favorable the witness himself is unpalatable,[10] and that the testimony is either irrelevant, cumulative, or in some other way neither advantageous nor disadvantageous.[11] Without some means of knowing which belief underlies conduct, any resulting adverse inference is more likely to be wrong than right.

The conventional answer to this problem, that the opponent of the inference can always offer evidence to explain the failure to call the witness,[12] is unsatisfactory. To offer an explanation is to invite the jury to consider a collateral issue and at a cost in trial time as great as offering the evidence itself. If the law feels compelled to deal at all with absent witnesses, would it not be more sensible to require that all witnesses must be called? Surely the jury is more likely to arrive at a correct result if the evidence it hears is directly concerned with the factual issues in the case than if it must speculate why some evidence is absent and what its content might be.

Assuming the absence of a witness has some probative value, the courts have had difficulty in expressing how much. In *United States v. Tucker*,[13] for example, the court said "the inference did not require the [trier] to assume that [the missing witness], if he had testified, would have supported [defendant's] story chapter and verse. The common sense notions underlying the inference required only the assumption that [his] testimony 'would not have been helpful' to the Government in proving its case, . . . or might have been harmful *in some way*."[14] If this is the best guidance a court can give to the trier, it would be better not to instruct the jury at all. In effect, all that is being said is that the trier can give the inference whatever weight, in its unconstrained discretion, it wants.[15] That may be the result dictated by the inability to determine what the appropriate weight, if any, may be. It is more likely that the exclusion of evidence, the probative value of which is undeterminable, is the better course.

The generally unsatisfactory nature of this evidentiary inference

10. Burgess v. United States, 440 F.2d 226, 234 (D.C. Cir. 1970) ("The informer might have been thought a poor witness, though not an adverse one.").

11. *E.g.*, United States v. Hines, 470 F.2d 225, 230 (3d Cir. 1972) ("Often all that can be inferred is that the witness' testimony would not have been *helpful* to a party, not that the testimony would have been *adverse*."), *cert. denied*, 410 U.S. 968 (1973).

12. "These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure." 2 J. WIGMORE, *supra* note 6, at 192. Error occurs if a party is denied an opportunity to explain the absence of a witness and is then subjected to a missing witness instruction. United States v. McCaskill, 481 F.2d 855 (8th Cir. 1973).

13. 552 F.2d 202 (7th Cir. 1977).

14. *Id.* at 211.

15. Equally puzzling is the view in the Second Circuit, following Wigmore, that when an uncalled witness is available to both parties, an adverse inference may be drawn against either or both of the parties. *See* United States v. Dixon, 536 F.2d 1388, 1394 (2d Cir. 1976); United States v. Ploof, 464 F.2d 116, 125 (2d Cir.), *cert. denied*, 409 U.S. 952 (1972); 2 J. WIGMORE, *supra* note 6, at § 288. How the jury is to comprehend such advice is not explained. *See also* Chicago Col. of Ost. Med. v. George A. Fuller Co., 719 F.2d 1335, 1354 (7th Cir. 1983). Compare the sample instruction in United States v. Young, 463 F.2d 934, 944 (D.C. Cir. 1972).

might not be a matter of concern if its application were rare.[16] That it should be rare is suggested by the requirement that, before it may be invoked by one party, the missing witness must be peculiarly within the control of the opposing party. In one sense, and with one exception, that test can never be met, for each party has subpoena power and is free to call any witness it wishes.[17] That simple approach has not been generally accepted. Thus, as one court put it, "whether a person is to be regarded as peculiarly within the control of one party may depend as much on his relationship to that party as on his physical availability."[18] Expanding on this, it said: "There may be a relationship of such description (legal, personal, practical or perhaps even social) between a prospective witness and one party that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability."[19] Put another way, this seems to be a rule that imposes on a party the obligation to call his close friends, employees, and relations on pain of an adverse evidentiary inference. Why only those who are impeachable for bias are required to be produced simply cannot be explained.

Strangely, in the one instance in which a witness is truly within the control of a party, when that party has a privilege concerning that testimony, an adverse inference is generally not permitted.[20] If an adverse in-

16. Reported appellate cases are not that frequent. Usage of the inference at trial, especially by way of argument, is very frequent indeed.

17. Perhaps a witness closely tied to one party but outside the jurisdiction and therefore the reach of process might be thought to be within one party's control. *See, e.g.*, State v. Condry, 114 Ariz. 499, 562 P.2d 379 (1977).

18. United States v. Blakemore, 489 F.2d 193, 195 (6th Cir. 1973). *See generally* Chicago Col. of Ost. Med. v. George A. Fuller Co., 719 F.2d 1335, 1353 (7th Cir. 1983) (former employee); United States v. Martin, 696 F.2d 49 (6th Cir.), (friends as within defendant's control), *cert. denied*, 103 S. Ct. 1532 (1983); United States v. Potter, 616 F.2d 384, 393 (9th Cir. 1979) (nurse employed by doctor within his control), *cert. denied*, 449 U.S. 832 (1980); United States v. Anders, 602 F.2d 823, 825 (8th Cir. 1979) (Secret Service handwriting expert; "The mere fact of employment with the government does not call for the giving of the absent witness instruction."); United States v. Carr, 584 F.2d 612, 618 (2d Cir. 1978) (city policeman not within control of federal government), *cert. denied*, 440 U.S. 935 (1979); United States v. Wright, 573 F.2d 681 (1st Cir.) (a witness present in courtroom sitting with defendant's family within defendant's control), *cert. denied*, 436 U.S. 949 (1978); United States v. Mahone, 537 F.2d 922 (7th Cir.) (policeman within prosecution's control), *cert. denied*, 429 U.S. 1025 (1976); United States v. Fisher, 484 F.2d 868 (4th Cir. 1973) (indicted co-conspirator present in courtroom not within prosecutor's control), *cert. denied*, 415 U.S. 924 (1974); United States v. Grizaffi, 471 F.2d 69 (7th Cir. 1972) (unindicted co-conspirator present in courtroom not within prosecutor's control), *cert. denied*, 411 U.S. 964 (1973); Kean v. Commissioner of Internal Revenue, 469 F.2d 1183 (9th Cir. 1972) (taxpayer party's accountant within his control); United States v. Young, 463 F.2d 934 (D.C. Cir. 1972); United States v. Garcia, 412 F.2d 999 (10th Cir. 1969) (defendant's brother within his control).

Generally an informant is not considered solely within the prosecutor's control. *See* United States v. Montoya, 676 F.2d 428 (10th Cir.) ("the prosecution is not under a duty to have its informant present at trial; the prosecution is bound only to give reasonable assistance to the defense in locating that prospective witness"), *cert. denied*, 103 S. Ct. 124 (1982); United States v. Burgos, 579 F.2d 747 (2d Cir. 1978); United States v. Johnson, 562 F.2d 515 (8th Cir. 1977). *But see* United States v. Pizarro, 717 F.2d 336, 346 (7th Cir. 1983); United States v. Johnson, 467 F.2d 804 (1st Cir. 1972) (jailed informant within prosecutor's control), *cert. denied*, 410 U.S. 909 (1973).

Of course, if neither party is physically able to call the witness, the inference is inappropriate. United States v. Pizarro, 717 F.2d at 346; United States v. Williams, 604 F.2d 1102, 1117 (8th Cir. 1979).

19. United States v. Blakemore, 489 F.2d at 195.

20. *E.g.*, United States v. Tsinnijinnie, 601 F.2d 1035 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980); United States v. Smith, 591 F.2d 1105 (5th Cir. 1979); United States v. Price, 573 F.2d

ference is a mechanism to punish failure to call a witness who should be called, however, this anomaly disappears. A privilege is, of course, a societal judgment that certain evidence need not be offered. To punish what has already been declared proper would itself be anomalous.

The second limitation on the availability of the missing witness inference, that the testimony not be "merely cumulative," is addressed to economic considerations. A party ought not be obligated to present repetitive evidence, on pain of an adverse inference, on a point already sufficiently addressed. But the very fact that this limitation exists shows the strangeness of the whole evidentiary conception. One can only know that the evidence is cumulative if one knows what the evidence is. If one knows what the evidence is, one knows whether it is adverse, cumulative or not. The inference could then be based on the content of the evidence rather that on its cumulative or non-cumulative nature. Of course, it would remain more sensible to offer the adverse evidence rather than blindly to infer its content.

The missing witness inference arose long before the advent of modern discovery procedures. Today, in civil litigation, the content of any proposed testimony is not only knowable but also generally known.[21] Adverse inferences make no sense when testimony that is in fact adverse can be offered. If the content of the testimony is not known, an adverse inference is appropriate only if it is desirable to force such discovery so that the inappropriateness of the inference can be shown. Forcing such discovery, however, runs squarely into existing concerns that overuse of discovery has

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356 (5th Cir. 1978); United States v. Pariente, 558 F.2d 1186 (5th Cir. 1977). The rule is not universal. *See* MCCORMICK'S, *supra* note 8 at § 76; Annot., 26 A.L.R.4th 9 (1983). Of course, if counsel for a privilege holder intimates by way of questioning or argument that the witness would support the holder's case, adverse argument is permissible. United States v. Tsinnijinnie, 601 F.2d at 1040 ("A defendant can exercise the spousal privilege free from adverse comment, or even explanation. But this is not a license to suggest that the Government has sinister motives for not calling a witness without having any explanation given."); United States v. Burkhart, 501 F.2d 993 (6th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975).

In United States v. Flomenhoft, 714 F.2d 708 (7th Cir. 1983), defendant wished a missing witness instruction with respect to a person whose testimony would allegedly be favorable to him but who was unwilling to testify absent a grant of immunity by the government. Rejecting this argument, the court said: "Requiring a missing witness instruction each time the prosecution decides not to immunize a witness would constitute a substantial judicial encroachment upon prosecutorial discretion." *Id.* at 714.

Threatened invocation of the self-incrimination privilege renders the witness unavailable to either party. United States v. Simmons, 663 F.2d 107 (D.C. Cir. 1979); United States v. Cohen, 631 F.2d 1223 (5th Cir. 1980).

21. Courts tend to speak in terms of equal availability and the cumulative nature of testimony when, in fact, the testimony is not adverse. Thus, in United States v. Warwick, 695 F.2d 1063 (7th Cir. 1982), a suit by the Small Business Administration on a note, a missing witness instruction on a previously deposed SBA employee was denied, the court saying:

> First, an adverse inference is permitted to be drawn against a party from its failure to call a witness only when the witness is peculiarly within that party's power to produce. . . . Here, the appellants simply declined to include Dixon on their pretrial list of potential witnesses, even though he was available and his testimony could be considered relevant. Second, such a negative inference may not be drawn where the unpresented testimony would be merely cumulative. . . . Here, in view of Dixon's previous answers at deposition to the precise "notice" question at issue, it is doubtful that additional light would have been shed by a continuation of this line of inquiry with the same witness.

Id. at 1069.

deleteriously added to the cost of litigation and delayed the just resolution of the cause.[22]

Criminal cases, despite having very different discovery rules, can be treated similarly. An adverse inference in favor of the defendant ought never be allowed because of the prosecutorial constitutional obligation to reveal favorable evidence to the accused.[23] Assuming that obligation has been fairly discharged,[24] the defense is free to offer such evidence. With respect to unrevealed evidence, the inference is misleading. To give it might nonetheless be appropriate if designed to force revelation of all evidence. Given the fact that the criminal discovery rules were expressly worked out to determine when revelation is required, balancing that against other societal interests, it would be inappropriate to use the inference to upset the present discovery balance without the reflection on consequences customarily present in rulemaking.[25] Inferences against the defendant, such as for failure to offer witnesses corroborative of testimony offered for the first time at trial, seem factually more compelling.[26] Even though it is incontestably frustrating to the prosecutor to hear a defense for the first time at trial without the means, because of the absence of discovery, to rebut it, the inference is appropriate only if either designed to force revelation in discovery or to force the offering of additional evidence at trial. Having decided in the rules, perhaps because of constitutional considerations,[27] not to require revelation, that considered judgment ought not be undercut by speculative evidentiary inferences. With respect to forcing presentation at trial, the same considerations militate against the inference in this context as in every other. If the prosecutor's frustration is to be assuaged, it can be done by a short continuance so that he can find those who might corroborate and offer them if he finds doing so advantageous.

Given the generally fragile probative value of the inference, it becomes clear that much of what actually goes on in trial courts is the effort to obtain a nonprobative tactical advantage.[28] Nowhere is this more evident than in closing argument, as the following passage from *United States*

22. *See generally Proceedings, National Conference on Discovery Reform*, 3 REV. LITIGATION 1 (1982).

23. *See* United States v. Agurs, 427 U.S. 97 (1976).

24. If constitutional rights are denied, stronger medicine than an adverse inference is necessary. *See* United States v. Tucker, 552 F.2d 202 (7th Cir. 1977) (conviction reversed where identity of informer not revealed, the trial judge substituting an adverse inference).

25. *See generally* 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE §§ 251-252 (2d ed. 1982). If broader discovery procedures became available, then criminal cases would be no different for purposes of adverse evidentiary inferences than civil cases. *See* A.B.A. STANDARDS FOR CRIMINAL JUSTICE Ch. 11 (2d ed. 1980).

26. *E.g.*, Gass v. United States, 416 F.2d 767, 775 (D.C. Cir. 1969) (alibi offered by defendant for first time at trial, alleged corroborating witnesses not being presented; such witnesses found to be peculiarly within the control of the defense because the "Government was unaware of them"). This problem has been eliminated by the Federal Rule of Criminal Procedure 12.1 requirement of a pretrial disclosure of the alibi defense and the witnesses upon whom defendant "intends to rely to establish such alibi."

27. 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 256 (2d ed. 1982); Comment, *Drawing an Inference From the Failure to Produce a Knowledgeable Witness: Evidentiary and Constitutional Considerations*, 61 CALIF. L. REV. 1422 (1973).

28. Burgess v. United States, 440 F.2d 226, 234 (D.C. Cir. 1970) ("there is the danger that the

v. Bramble[29] demonstrates:

> We find no error in the refusal of the court to permit Bramble's counsel to argue to the jury that it could draw an unfavorable inference against the government from the fact that Spalding did not testify. In defense counsel's interview of Spalding she must have learned either (1) that his testimony would be unfavorable to Bramble, or (2) that it would be favorable to him, or (3) that it would be of little help to either side. If it would have been unfavorable to Bramble, her argument based on his absence would have been fraudulent. If it would have been favorable to Bramble, she could have called him, and if she did not, his absence should be attributable to her, not to the government. Again, her proposed argument would have been misleading. It would give the defense some of the benefit to be obtained from his testimony, without the risk of cross examination. If the testimony would have been of little benefit to either side, it would be misleading to argue that Spalding's absence supports an inference favorable to Bramble's side. We deal here with gamesmanship, and we decline to support it.[30]

Recent cases that have approved the use of an adverse inference are explainable less in terms of the customary evidentiary explanation for the inference and more in terms of the relationship of the witness to the controversy. Thus in *SEC v. Scott*, the failure of a party to testify in response to circumstantial evidence of scienter was held to justify an adverse inference.[31] Similarly, the failure of a surviving spouse to testify as to damages in a wrongful death action required an adverse inference instruction in *McElroy v. Cessna Aircraft Co.*[32] Finally, the failure of an inventor to testify in a patent interference proceeding led to a negative inference in *Borror v. Herz*.[33] Each of these cases emphasized the evidence that might reasonably be expected in a particular kind of case. In *Scott*, the issue was the mental state of the party nonwitness, something only that party could testify to directly.[34] *McElroy* referred to "evidence that would be expected under the circumstances."[35] *Borror* is even clearer: "The inventor's testimony forms a natural and expectable element of an interference party's total proof."[36]

What these cases demonstrate is that the adverse inference is required only when the missing witness bears such an important relationship to the factual issue in controversy that it is appropriate to insist on the presence of that witness. That is an easier test to apply than the traditional formulation of the missing witness rule. Rather than speculate about the content of testimony and the relationship of the witness to the party, the court need

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instruction permitting an adverse inference may add a fictitious weight to one side or another of the case.").

29. 680 F.2d 590 (9th Cir.), *cert. denied*, 103 S. Ct. 493 (1982).
30. *Id.* at 592.
31. 565 F. Supp. 1513, 1533 (S.D.N.Y. 1983).
32. 506 F. Supp. 1211, 1219 (W.D. Pa. 1981).
33. 666 F.2d 569, 573-74 (C.C.P.A. 1981).
34. 565 F. Supp. at 1533.
35. 506 F. Supp. at 1219.
36. 666 F.2d at 573.

only ask if in certain kinds of cases certain witnesses must be presented. Once one moves beyond parties and those having special knowledge of certain facts in controversy, any list of required witnesses is likely to be very short.

McCormick has argued that both the giving of an instruction and the control of argument about missing witnesses ought to be left to the discretion of the trial court rather than to "elaborate rules of law defining the circumstances when the right exists."[37] The trouble with this argument is that discretion without a sense of how that discretion is to be exercised is simply whim. Once one seeks to identify the factors that ought to control discretion, elaborate rules of law result. The virtue of focusing on the witnesses that ought to be demanded in particular cases is that the experienced trial judge can exercise his discretion by referring to witnesses that are generally presented and generally have important information to offer in specific recurring factual contexts.

Weaker Evidence

Another standard jury instruction reads: "If a party offers weaker and less satisfactory evidence when stronger and more satisfactory evidence could have been produced, you may view the evidence offered with suspicion."[38] *Kaiser Aluminum & Chemical Corp. v. Illinois Central Gulf Railroad*[39] is illustrative. Kaiser sued for the loss of bauxite allegedly damaged by contamination from unclean hopper cars. The railroad introduced evidence of a business routine "to clean and inspect its cars and to retain a record" of such cleaning.[40] No cleaning records as to the particular cars in issue were introduced. Is it fair to infer from this failure to introduce specific evidence that the general evidence is false as to these cars? If it is, it is for exactly the same reasons as apply to an adverse inference to the missing witness.

The evidentiary problems associated with the weaker evidence inference are identical to those associated with the missing witness inference. First, it is far from clear which evidence is weaker and which stronger; often, as with most questions of probative weight, any judgment is simply a veiled preference for one type of evidence over another.[41] Second, the allegedly stronger evidence is discoverable by the adverse party and, if truly helpful, could be presented.[42] Third, assuming an adverse inference

37. MCCORMICK'S, *supra* note 8, at 659.

38. 1 E. DEVITT & C. BLACKMAR, *supra* note 1, at § 15.27. *See also* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse."); CAL. EVID. CODE § 412 (1967).

39. 615 F.2d 470 (8th Cir.), *cert. denied*, 449 U.S. 890 (1980). Failure to introduce the specific records was held to prove that no such records existed from which, under FED. R. EVID. 803(7), it could be inferred that no cleaning took place.

40. *Id.* at 476.

41. 1 J. WIGMORE, *supra* note 6, at § 26 (Tillers rev. 1983). *See* Kean v. Commissioner of Internal Revenue, 469 F.2d 1183 (9th Cir. 1972) (taxpayer's accountant a "superior" witness to taxpayer on whether accountant had made errors).

42. Failure to respond to a discovery request would, of course, justify an adverse inference.

is appropriate, the problem of how much weight to give it remains insoluble.

If the inference is ever appropriate, it is because it is proper to require certain kinds of evidence with respect to certain kinds of issues.[43] *Kaiser* may be an example. When the evidence shows that contemporaneous business records of a particular transaction were made, it does not seem wrong to require their production. Business records have always been considered particularly reliable, more reliable in fact than eyewitness memories of the routinized and repetitive transactions, such as cleaning cars, they record.[44] A series of evidential judgments of this sort could be made, enforced by the threat of an adverse inference.

A problem with this approach is its failure to coincide with normal conceptions of the appropriate role of counsel in an adversary system. To think of an adverse inference as a mechanism to require the production of certain evidence is to impose on counsel the obligation to produce evidence adverse to his cause. Lawyers don't do that. If opposing counsel has not the wit to discover and produce all the evidence favorable to his cause, that is his problem.

To those outraged plaints, there are two replies. The first, of course, is that traditional notions ought not control what obligations may properly lead to the just resolution of particular cases. There is no particular reason why trial rules ought not to tilt toward the truth even if less competent counsel is advantaged thereby. The second response is that the existing evidentiary inferences already distort the customary allocation of responsibilities of counsel. If an adverse inference is presently appropriate, it serves to provide favorable evidence to one side of the controversy without requiring counsel for that side even to discover if the absent evidence is in fact favorable. If the customary role of counsel is to control resolution of the problems of absent evidence, abolition of existing inferences would be called for.

If it is appropriate, as this essay contends, to use the inference to insure the presentation of evidence, then it must be asked against which party that obligation will be created. Generally it should be used against the party having the burden of proof.[45] That would account for the results

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See Brown v. Cedar Rapids & Iowa City Ry., 650 F.2d 159, 162 n.3 (8th Cir. 1981); UAW v. NLRB, 459 F.2d 1329, 1338 (D.C. Cir. 1972).

43. Before it is appropriate, "the totality of circumstances must bring home to the non-producing party notice that the inference may be drawn." Commercial Ins. Co. v. Gonzalez, 512 F.2d 1307, 1314 (1st Cir.), *cert. denied*, 423 U.S. 838 (1975).

44. McCORMICK'S, *supra* note 8, at § 306. *See also* UAW v. NLRB, 459 F.2d at 1333. This rationale also explains Midland Enter., Inc. v. Notre Dame Fleeting & Towing Serv., Inc., 538 F.2d 1356 (8th Cir. 1976), where an adverse inference for failure to call eyewitnesses was denied because their observations if unfavorable would have been reflected in a business record which was available.

45. Karavos Compania Naviera S.A. v. Atlantica Export Corp., 588 F.2d 1, 10 (2d Cir. 1978) (failure to call alleged agent on issue of whether he was authorized). Related is the proposition that the failure to produce evidence by one not having the burden cannot be used to convert evidence otherwise insufficient into a prima facie case for the party having the burden. Layne v. Vizant, 657 F.2d 468 (1st Cir. 1981); NLRB v. Chester Valley, Inc., 652 F.2d 263 (2d Cir. 1981); Stowe Township v. Standard Life Ins. Co., 507 F.2d 1332 (3d Cir. 1975). Of course once the party with the burden has established a prima facie case, the inference may become available against

in *Borror* and *McElroy*, discussed earlier.[46] Other rules would sometimes be appropriate. If a party is to be required to testify, it should be because of his special knowledge of a fact in issue, as was true in *Scott*, where the defendant's mental state was determinative.[47] Finally, in *Kaiser Aluminum*, the obligation on the defendant could be created because it undertook to rebut a prima facie case by means substantially less persuasive than those clearly available to it. What is important in all this, of course, is not the creation of a set of rules as to when adverse inferences ought to be used but instead a set of factors to guide the exercise of discretion of the trial court in those few instances where insistence on the presentation of evidence is appropriate.

Failure to Create or Preserve Evidence

Anyone familiar with the trial of criminal cases is familiar with the common defense argument that the police failed to take fingerprints at the scene.[48] It matters not that three witnesses saw the defendant with his fingers on the gun as it discharged; still, the argument goes, the prosecution ought to be punished by an adverse inference for the failure of its agents to check for fingerprints that might have revealed that the shooter was someone other than the person identified. If this argument makes sense other than as a quaint device offered to defense counsel to fill up time in a lost cause, it is because it is appropriate to impose on the government the obligation to preserve evidence in certain instances.

A recent Arizona case, *State v. Hunter*,[49] illustrates how such an obligation can be imposed. A fight developed between Demint and Hunter. Police were called, but by the time they arrived, Hunter had fled. In the words of the court:

> When police entered the Demint home they found the victim in a pool of blood in the kitchen. The house showed signs of a struggle. There was a pair of scissors next to the body and a bloody hunting knife in the den. The police immediately seized the hunting knife but not the scissors. It was latter determined that the victim had suffered several stab wounds, two of which would have been fatal. One was a chest wound apparently caused by a knife, and the other was an abdominal wound consistent with the pair of scissors.
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> As the police were concluding their investigation a friend of the family arrived at the house in order to clean it up before Mrs.

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the opposing party. *See* Braewood Convalescent Hosp. v. Workers' Compensation Appeals Bd., 34 Cal. 3d 159, 168, 193 Cal. Rptr. 157, 163, 666 P.2d 14, 20 (1983) ("when a party testifies to facts favorable to his own position and any contradictory evidence is within the ability of the opposing party to produce, the latter party's failure to bring forth such evidence will require acceptance of the uncontradicted testimony unless there is some other rational basis for disbelieving it").

46. *See supra* notes 32 and 33 and accompanying text.

47. *See supra* note 31 and accompanying text. *See also* Alabama Power Co. v. Federal Power Comm'n, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974) ("placing such a burden on the regulated firm where the relevant information concerns its operations and management").

48. It is permissible to offer evidence in anticipation of such an argument explaining why such procedures were not followed. United States v. Peters, 610 F.2d 338 (5th Cir. 1980).

49. 136 Ariz. 45, 664 P.2d 195 (1983). *Compare* United States v. Coe, 718 F.2d 830 (7th Cir. 1983) (destruction of fingerprints requires neither mistrial nor missing witness instructions).

> Demint returned. With a police detective present, and with his permission, the friend picked up the scissors from beside the body, wiped them off with a towel, and put them on a kitchen counter. Several hours later the police determined that the scissors may have been significant, and a detective returned to the house and seized them.[50]

At trial defendant testified that, acting in self defense against an attack by Demint with the scissors, he had stabbed Demint with the knife. He argued that the jury should be instructed that if an "agent of the state allowed material evidence to be destroyed," then the jury "could infer that the evidence would be against the interests of the state."[51] On appeal, that argument prevailed, the court finding that if the scissors had been carefully preserved they might have revealed Demint's fingerprints and thus have supported Hunter's testimony.

Although cast in the form of customary evidentiary inferences, *Hunter* makes sense, if at all, only in terms of an obligation to preserve certain kinds of evidence. First, it is clear that the police, not having the benefit of Hunter's later testimony, did not know the scissors were evidence. Allowing the scissors to be handled could not have been motivated, therefore, by a desire to see possibly adverse evidence destroyed, a normal predicate to an adverse inference.[52] Indeed, because the evidentiary value of the scissors was unknown and unknowable at the time the room was cleaned in anticipation of the return of the widow, the police could not have recognized their obligation to preserve evidence. To infer in such circumstances that the absent evidence supported the defendant is simply to engage in charitable speculation. If such an act of charity, normally not accorded as such to killers, is defensible, it must have a purpose. On the *Hunter* facts, the only purpose would be to impose an obligation on police to preserve items of potential evidentiary value.

The problem with *Hunter* is not that it is undesirable to impose on the government such an obligation. Because of the special due process duty of fairness in criminal prosecutions, such an obligation is at least arguably appropriate.[53] Rather, the problem is that the breadth of the obligation imposed is undischargeable. Unless one has reason to know that something is of evidentiary value, one cannot act to preserve it. To meet the *Hunter* obligation, the police would have had to seal off the Demint house and to analyze everything within it with a view, necessarily speculative, as to what Hunter might testify to. Not only would this impose a large cost burden on the state, but it would also deprive Mrs. Demint of her house until the evidentiary analysis was complete. These are rather substantial burdens to impose on as speculative a basis as advanced by the *Hunter* court.

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50. 136 Ariz. at 47, 664 P.2d at 197.

51. *Id.* at 50, 664 P.2d at 200.

52. McCORMICK'S, *supra* note 8, at § 273.

53. An obligation to preserve evidence once created was grounded in due process considerations in United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971). That has not been extended to impose a duty to create evidence. United States v. Weisz, 718 F.2d 413 (D.C. Cir. 1983).

Even the imposition of the lesser burden not to be negligent in allowing destruction of what turns out to be of potential evidential value creates problems. The trial of Jeffrey McDonald illustrates this.[54] Military police reporting to the scene of a triple homicide and to the apparent serious injury of Dr. McDonald so acted as to render possible evidence supportive of Dr. McDonald's defense unavailable. To infer, by way of judicial instruction that such evidence would have been favorable to McDonald is, of course, charitably speculative. While police performance might be improved by the sanction of an adverse inference, negligence will never be eliminated. To distort factfinding in every instance of negligence may be too high a price to pay for whatever deterrent value the inference would have. It would still be appropriate for a jury to harbor a reasonable doubt because certain evidence was unavailable, and an argument to that effect could be made. But it hardly seems right to invite such a doubt by saying that the law requires or invites the jury to infer that such evidence would be favorable to defendant.

The problem with a general command such as "go forth and preserve everything of evidentiary value" is that it is insufficiently specific to insure compliance. Just as with other forms of absent evidence, compulsion through adverse inference can work only when one can identify recurring instances of non-production of important evidence that can be reached by the threat of sanction. This has been done, by the threatened use of different sanctions, in a number of instances in the criminal trial process. Thus, some courts require governmental agents to keep rough interview notes which are later incorporated in formal reports.[55] A similar rule requires the government not to deport alien witnesses in an alien transportation prosecution until defense counsel has had an opportunity to interview them.[56] Finally, many courts impose an obligation to preserve urine, blood, and breath samples for defense analysis so that a fair opportunity to contest prosecution expert evidence will be available.[57] What these examples have in common is that they require evidence creation or preservation in situations sufficiently frequent that the command will cause compliance.

So far the discussion has addressed preservation of evidence in the context of the government as prosecutor. The same questions can arise in civil litigation. If adverse inferences are conceived as mechanisms to in-

54. J. MCGINNISS, FATAL VISION 189-192 (1983).

55. *E.g.*, United States v. Griffin, 659 F.2d 932 (9th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975).

56. *E.g.*, United States v. Avila-Dominguez, 610 F.2d 1266 (5th Cir.), *cert. denied*, 449 U.S. 887 (1980); United States v. Mendez-Rodriguez, 450 F.2d 1 (9th Cir. 1971). The sanction of dismissal for failure to discharge this obligation, once routinely imposed, was disapproved in United States v. Valenzuela-Bernal, 458 U.S. 858 (1982), absent a showing that the lost evidence was critical to the defense. *See also* United States v. Kincaid, 712 F.2d 1 (1st Cir. 1983).

57. *E.g.*, People v. Moore, 34 Cal. 3d 215, 193 Cal. Rptr. 404, 666 P.2d 419 (1983); Scales v. City Court of the City of Mesa, 122 Ariz. 231, 594 P.2d 97 (1979). These cases require exclusion of expert evidence on behalf of the prosecution as a remedy for the failure to preserve samples for the defense. That is a more Draconian remedy than an adverse inference; its purpose, of course, is identical. *But see* United States v. Nabors, 707 F.2d 1294 (11th Cir. 1983) (negligent destruction of contraband did not preclude expert evidence that it was contraband) and California v. Trombetta, 52 U.S.L.W. 4744 (U.S. June 11, 1984) (failure to preserve breath samples is not a constitutional violation).

sure the availability of evidence, they can be appropriately invoked whenever addressed to institutions or individuals capable of responding to legal commands. Just as police will respond by crime scene preservation to adverse inferences from nonpreservation, so too will insurers respond by way of accident analysis and corporations respond by records preservation[58] if the commands are sufficiently specific and the events recorded sufficiently likely to result in litigation that nonpreservation will be costly.[59] For individuals who are rarely, if ever, involved in litigation, efforts to command their compliance are fruitless. Adverse inferences, by instruction or argument, are inappropriate for such individuals although explanations as to why expected evidence is absent are justified.

To be distinguished from adverse inferences are two related matters. It remains appropriate to argue[60] and to instruct[61] that the burden of proof has not been carried because the evidence presented is insufficient. It is also appropriate, even where neither counsel nor the court will mention an adverse inference, to offer evidence explaining the absence of evidence the trier might expect to hear in order to avoid a jury-generated but inappropriate adverse inference.[62]

Conclusion

The purpose of this essay has been to explore the soundness of the evidentiary basis for an adverse inference from the failure to produce or preserve certain evidence. For a variety of reasons, the conclusion is inescapable that as a general rule such inferences are unsound. They may, however, be justified as a mechanism to insure, in a limited number of instances, that certain evidence will be presented. Requiring trial judges to address the inference in these terms is more likely to improve factfinding not only because important evidence will more probably be available but also because factually misleading inferences will be eliminated. This is also an easier basis on which to apply the inference because it asks what evidence is traditionally presented in typical cases and whether the absence of such evidence is likely to present a distorted picture to the trier.

58. *See* Fedders & Guttenplan, *Document Retention and Destruction: Practical, Legal, and Ethical Considerations*, 56 NOTRE DAME LAW. 5, 53-55 (1980).

59. *But see* Gumbs v. International Harvester, Inc., 718 F.2d 88 (3d Cir. 1983) (inference disallowed where plaintiff's expert did not preserve U-bolt he later testified was defective).

60. *See* United States v. Martin, 696 F.2d 49 (6th Cir.), *cert. denied*, 103 S. Ct. 1532 (1983); Burgess v. United States, 440 F.2d 226, 236 (D.C. Cir. 1970) (Robinson, J., concurring). It also is appropriate to argue that evidence is uncontradicted. United States v. Grammer, 513 F.2d 673 (9th Cir. 1975).

61. United States v. Smith, 602 F.2d 834, 839 (8th Cir.), *cert. denied*, 444 U.S. 902 (1979); United States v. Allsup, 573 F.2d 1141, 1145 n.6 (9th Cir.), *cert. denied*, 436 U.S. 961 (1978) ("a doubt based upon reason arising out of the evidence or lack of evidence in the case.").

62. Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CALIF. L. REV. 1011 (1978).